

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

**STATION CASINOS, INC., ALIANTE GAMING, LLC,  
BOULDER STATION, INC., D/B/A BOULDER  
STATION HOTEL & CASINO, PALACE STATION  
HOTEL & CASINO, INC., D/B/A PALACE STATION  
HOTEL & CASINO**

**and**

**LOCAL JOINT EXECUTIVE BOARD OF LAS  
VEGAS, CULINARY WORKERS UNION, LOCAL 226  
AND BARTENDERS UNION LOCAL 165, affiliated  
with UNITE HERE, AFL-CIO**

**Cases 28-CA-023436  
28-CA-062437**

**REPLY TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent Station Casinos, Inc., Aliante Gaming, LLC, Boulder Station, Inc., d/b/a Boulder Station Hotel & Casino, and Palace Station Hotel & Casino, Inc., d/b/a Palace Station Hotel & Casino submits this Reply to the Acting General Counsel's Answering Brief in the above-captioned matters. In its Answering Brief, the Acting General Counsel attempts to minimize the critical deficiencies in the testimony of the witnesses it offered in support of the allegations contained in Paragraphs 6(a) and 6(b) of the Consolidated Complaint and erroneously shift the burden of proof to Respondent. As discussed here and in Respondent's Brief in Support of Exceptions, because the clear preponderance of the evidence fails to support ALJ Etchingham's credibility resolutions with respect to the alleged October 7, 2010 incident, Respondent respectfully requests that the Board dismiss the Consolidated Complaint in its entirety.

**I. THE CLEAR PREPONDERANCE OF THE EVIDENCE DEMONSTRATES THAT ALJ ETCHINGHAM'S CREDIBILITY RESOLUTIONS ARE INCORRECT**

Contrary to the Acting General Counsel's hyperbole, the clear preponderance of the evidence demonstrates that ALJ Etchingham's credibility resolutions with respect to the alleged October 7, 2010 incident are void of support and meaningful explanation. Sous Chef Walter Phillips credibly testified that Room Chef Candice Cullen, and not he, conducted the huddle on October 7, 2010. (Tr. 405, 408.) Phillips was able to recall what occurred on October 7, 2010 because it was a few days before his birthday. (Tr. 405.) Phillips' testimony was corroborated by Respondent's records, which demonstrate that both he and Cullen worked on October 7, 2010, and Kitchen Runner Martha James who testified that when Cullen worked, she, not Phillips, led the huddle.<sup>1</sup> (Resp. Ex. 10; Tr. 306.) In contrast, the testimony of Cook Adolfo Gaspar, James, and Kitchen Runner Maria Susane Lopez is inconsistent, fabricated and unreliable.

Implicit in the Acting General Counsel's defense of the testimony it offered is the argument that the October 7, 2010 date and/or the Team Members' ability to recall the date is not critical. The Acting General Counsel is mistaken. First, establishing the date of the incident is critical in a case like this one where the alleged incident occurred on October 7, 2010, and the unfair labor practice charge was filed on April 6, 2011, rendering the charge two days shy of being untimely.<sup>2</sup> *See Procter & Gamble Mfg. Co.*, 160 N.L.R.B. 334, 412-13 (1966) (finding

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<sup>1</sup> Without meaningful explanation, ALJ Etchingham erroneously disregards James' statement that when Phillips and Cullen work together, Cullen leads the huddle. (ALJD, p. 9 n.12.)

<sup>2</sup> Section 10(b) of the National Labor Relations Act ("Act") provides, in relevant part, "... no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."

testimony of witness regarding date of incident too uncertain to conclude that incident occurred within 10(b) period); *Valley Transit Co.*, 142 N.L.R.B. 658, 667 n.4 (1963) (finding no violation of the Act where employee's testimony regarding date of incident was too uncertain to establish that claim was timely); *Haynesville Mfg. Co.*, 140 N.L.R.B. 977, 985 n.3 (1963) (testimony of witness regarding date of alleged incident too uncertain to establish that event occurred within 10(b) period).

Second, failure to recall the date indicates that the witnesses' testimony is incredible and arguably fabricated.<sup>3</sup> Other than Gaspar, no witness offered by the Acting General Counsel had an independent recollection of the alleged huddle occurring on October 7, 2010. (Tr. 283, 293, 305.) In conjunction with the inconsistency of the testimony offered,<sup>4</sup> the witnesses' failure to recall the date renders their testimony incredible and ALJ Etchingham's conclusion that such testimony "outweighs" Phillips' testimony void of support. *See Inter-Disciplinary Advantage, Inc.*, 349 N.L.R.B. 480, 486, fn.12 (2007) (witness's failure to recall date and other details of incident rendered her testimony incredible); *Medical Ctr. Of Ocean County*, 315 N.L.R.B. 1150, 1163-64 (1994) (witness's testimony was "not encouraging with regard to establishing . . . veracity and credibility" where, among other deficiencies, witness could not recall dates of

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<sup>3</sup> Such conclusion is not far-fetched. Under similar circumstances, where Respondent offered documentary and testimonial evidence demonstrating that Sanitation Supervisor Margarito Garcia was not present for a huddle during which Team Members allegedly complained about working conditions, ALJ Etchingham properly found the testimony offered by the Acting General Counsel in support of the alleged incidents to be unsupported and incredible. (ALJD, p. 9, lines 4-5, p. 10, lines 5-25.) The Acting General Counsel failed to take exception from these findings. Indeed, in his Brief in Support of his Cross-Exceptions, the Acting General Counsel writes, "It is respectfully submitted that in all respects, other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record." (Brief in Support of Acting General Counsel's Cross-Exceptions, p. 1.)

<sup>4</sup> In its Answering Brief, the Acting General Counsel does not deny the inconsistency of the testimony it offered.



conversations); *Redwood Empire*, 2003 WL 21734554 (N.L.R.B. Div. of Judges, Jul. 21, 2003) (finding that witness lacked credibility where, in addition to inconsistencies within testimony, witness could not recall dates of alleged unlawful conduct).

In addition to its attempt to minimize the deficiencies in the testimony of the witnesses it offered, the Acting General Counsel seeks to shift the burden of proof in this case to Respondent by supporting ALJ Etchingham's finding that Phillips' testimony was "unworthy of belief" because it was "unsubstantiated by Cullen." It is the Acting General Counsel and not the Respondent that carries the burden of proof in a case where Section 8(a)(1) violations are alleged. *Engelhard Corp.*, 342 N.L.R.B. 46, 46 n.1, 58 (2004) (dismissing 8(a)(1) allegation where General Counsel failed to satisfy its "burden of establishing by a preponderance of the credible evidence that [a manager] made the threat attributed to her"). There was no obligation that the Respondent subpoena Cullen, who is no longer employed by Respondent, to testify, and its failure to do so should not have resulted in ALJ Etchingham's diminishment of Phillips' credibility. *See Reno Hilton Resorts*, 326 N.L.R.B. 1421, 1421 n.1 (1998) (declining to draw adverse inference based on employer's failure to call former supervisor to testify); *Irwin Industries, Inc.*, 325 N.L.R.B. 796, 811 n.12 (1998) (declining to draw adverse inference based on employer's failure to call former supervisor; former supervisor was equally available to General Counsel, union and employer).

## **II. RESPONDENT'S FINAL TWO ARGUMENTS HAVE MERIT**

### **A. ALJ Etchingham Erred in Relying Upon *S.E. Nichols, Inc.***

The Acting General Counsel misstates the Respondent's argument. Respondent does not contend that ALJ Etchingham committed reversible error by relying upon *S.E. Nichols, Inc.* to credit the testimony of Gaspar, Lopez, and James because of their continued employment with

Respondent. Respondent contends that ALJ Etchingham committed reversible error by relying upon *S.E. Nichols, Inc.* because the testimony of Gaspar, James, and Lopez is unreliable.

As the Acting General Counsel wrote in its Answering Brief, reliance upon *S.E. Nichols, Inc.* is "based on the particular[] reliability of such witnesses." (Acting General Counsel's Answering Brief, p. 7.) Where, as here, the testimony of witnesses offered by the Acting General Counsel in support of its case is unreliable, ALJ Etchingham should not have relied upon *S.E. Nichols, Inc.* to credit their testimony over that of Phillips.

The Acting General Counsel cites to *Gold Standard Enterprises, Inc.*, 234 N.L.R.B. 618, 619 (1978) and *Shop-Rite Supermarket*, 231 N.L.R.B. 500, 505 fn.22 (1977) in support of its argument that ALJ Etchingham's credibility resolutions were proper. These cases, however, are inapposite because the testimony of the General Counsel's witnesses therein was not subject to the same deficiencies that are present in the instant matter. Indeed, in *Gold Standard Enterprises*, the Board specifically noted that the witnesses' testimony was "mutually corroborative" and "consistent" and that there was no reason apparent from the record to disregard their testimony. 234 N.L.R.B. at 619. And, in *Shop-Rite Supermarket*, there was no suggestion that the witness' testimony was fabricated, inconsistent, the product of a faulty recollection, or otherwise unreliable. 231 N.L.R.B. 500.

In contrast, as discussed above and at length in Respondent's Brief In Support of Exceptions, Gaspar, Lopez and James had differing recollections as to what Phillips said during the huddle, and neither Lopez nor James had any independent recollection of Phillips leading a huddle on October 7, 2010. Equally troubling, Lopez admitted during cross examination that she is not fluent in English and there was "a lot" she did not understand during the huddle. (Tr. 272, 288, 289). The mere fact that the General Counsel's witnesses are current employees of the Respondent does not cure these critical deficiencies in their testimony, and therefore, the ALJ's

reliance on *S.E. Nichols, Inc.* is erroneous. See *United States Postal Service*, 268 N.L.R.B. 1385, 1388 fn.7 (1984) (finding witness lacked credibility despite status as current employee where testimony was otherwise unreliable); *UPS Supply Chain Solutions, Inc.*, 357 N.L.R.B. No. 106, 2011 WL 5320529 at \*15 fn. 15 (2011) (same).

**B. ALJ Etchingham Erred in Failing to Draw an Adverse Inference From the Acting General Counsel's Failure to Call Additional Witnesses**

Again, the Acting General Counsel attempts to shift the burden of proof to Respondent in supporting ALJ Etchingham's failure to draw an adverse inference from the Acting General Counsel's failure to call additional witnesses. It writes, "Respondent seeks to turn the burden of proof on its head and to mask Respondent's failure to support its uncorroborated denial." (Acting General Counsel's Answering Brief, p. 8.) As discussed above, it is the Acting General Counsel and not the Respondent that carries the burden of proof in this case. The Acting General Counsel had the option, after offering inconsistent, fabricated and unreliable testimony, to call additional Team Members in support of its case. It failed to do so, and ALJ Etchingham erred in failing to draw an adverse inference or at least considering such failure in determining whether the General Counsel had established by a preponderance of the evidence that a violation occurred. See *Austal U.S.A., LLC*, 356 N.L.R.B. No. 65, 2010 WL 5462282, at \*53 (Dec. 30, 2010) (citing *Battle Creek Health Systems*, 341 N.L.R.B. 882, 884 (2004)) (drawing adverse inference as a result of General Counsel and union's failure to call two other employees to corroborate testimony of witness where employees' testimony could "reasonably be presumed to be favorably disposed to [the General Counsel and union's] position"); *Boardwalk Regency Corp.*, 344 N.L.R.B. 984, 988 (2005) (drawing adverse inference due to General Counsel and union's failure to produce additional witnesses to corroborate testimony); see also *C & S Distributors, Inc.*, 321 N.L.R.B. 404, 404 (1996) (even where adverse inference is not

appropriate, “a judge may properly consider the failure to call an identified, potentially corroborating witness . . . as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred”); *Queen of the Valley Hosp.*, 316 N.L.R.B. 721, 721 n.1 (1995) (same); *see also W. Irving Die Casting of Ky., Inc.*, 346 N.L.R.B. 349, 352 (2006) (declining to draw an adverse inference from failure to call witness, but weighing, as part of credibility determination of testifying witness, “the failure of the General Counsel to call a potentially corroborating witness”).

### III. CONCLUSION

For the foregoing reasons, the Board should find the arguments asserted in the Acting General Counsel’s Answering Brief unpersuasive and dismiss the Consolidated Complaint in its entirety.

Respectfully submitted,

DLA PIPER US LLP

By Harriet Lipkin <sup>NEL</sup>  
Harriet Lipkin  
500 8th Street, N.W.  
Washington, D.C. 20004  
202.799.4250

Dianne LaRocca  
1251 Avenue of the Americas  
New York, New York 10020  
212.335.4851

Attorneys for the Respondent

Dated: March 27, 2012



**CERTIFICATE OF SERVICE**

I hereby certify that on this **27**th day of March, 2012, a copy of the Reply to Acting General Counsel's Answering Brief was filed electronically and by overnight mail, upon the following:

Lester A. Heltzer  
Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570

Hon. Gerald Etchingham  
Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103

Pablo Godoy  
Larry Smith  
National Labor Relations Board  
Region 28  
600 Las Vegas Blvd. South, Suite 400  
Las Vegas, NV 89101

Richard McCracken  
McCracken, Stemerman & Holsberry  
1630 South Commerce Street, Suite A-1  
Las Vegas, NV 89102

Local Joint Executive Board of Las Vegas  
1630 South Commerce Street  
Las Vegas, NV 89102

  
An Employee of DLA Piper US LLP